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No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER,
Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF TEXAS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING APPELLANTS

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QUESTION PRESENTED

Do voters still have an enforceable vote-dilution claim under the Fourteenth Amendment when their legislature dilutes the power of their vote by as much as 50% compared to other voters in nearby districts as a result of drawing state legislative districts strictly on the basis of population?

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on important policy issues, and litigates regularly before the Supreme Court of the United States, including such cases as *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Northwest Austin Municipal Utility District No. One* v. *Holder*, 557 U.S. 193 (2009); *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000); and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989).

In particular, SLF advocates for a color-blind interpretation of the Constitution, protection of all qualified voters' constitutional right to vote and preservation of the one-person, one-vote principle guaranteed by the Equal Protection Clause of the Fourteenth Amendment. This case is important to SLF because it threatens to erode the one-person, one-vote principle by allowing state legislatures to focus only on the equalization of

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[1] SLF hereby represents that all parties have been notified of and consented to the filing of this brief. Their letters of consent have been filed with the Clerk pursuant to Rule 36. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission.

state legislative districts by population as the ultimate goal of redistricting, without regard to the effect such population-balancing has on citizens' voting power—even when, as here, it results in substantial vote dilution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since *Baker v. Carr*, 369 U.S. 186 (1962), the Court has repeatedly made room on its docket for cases that instruct lower courts on implementing the one-person, one-vote principle. *Reynolds v. Sims*, 377 U.S. 533, 567 (1964), established that "the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives." When it comes to establishing legislative district lines at the state level, "[w]hatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579 (emphasis added).

For decades following *Reynolds*, states could safely assume that balancing population served the ultimate goal of achieving substantially equal voting strength among districts. In many states now, that assumption is no longer valid in light of the increased presence of people ineligible to vote. Yet here, as in many states, Texas equalized legislative districts on a population basis without regard to its effects on voting strength. This has resulted in a huge disparity of voting power among

its citizens, depending, in direct contravention of *Reynolds*, on where they live within the State.

Standing alone this case would present a "substantial question" worthy of setting the matter for oral argument. In light of the confused and varied treatment throughout the circuits, there is no room for argument that the question is not substantial.

Amicus further note below that, if the question requires a balancing or choice between the rights of non-citizens to representation and the Equal Protection rights of citizens under the one-person, one-vote doctrine, the current state of the law, particularly in the Ninth Circuit, wrongly subordinates the voting rights of citizens. *Reynolds* used population balancing as a means to achieve the "overriding objective" of substantially equally-weighted votes, not as an end in itself.

But legislatures need not always choose one interest over the other. This case shows that, particularly in light of technological advances in software databases, states can construct districts that are both substantially equal in population and voting strength. When, as here, a legislature's refusal to achieve both goals yields a districting scheme that weights some votes 50% more than others, the one-person, one-vote principle is violated. At a minimum, further briefing and argument would demonstrate the extent to which technology has eliminated the need to make an either/or choice between population equality and voting equality

ARGUMENT

I. The Question Presented Is Substantial, And Now Is The Right Time To Answer It.

At this stage, the Court need only decide that the question raised by the appeal is "substantial" to set the case for oral argument. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). The Jurisdictional Statement raises a question that satisfies this standard: do voters still have an enforceable vote-dilution claim under the Fourteenth Amendment when their legislature dilutes the power of their vote by as much as 50% compared to other voters in nearby districts?

The only reason the answer to this question is not "Of course!" in the Ninth (and every) Circuit is that the district lines in this case were drawn on the basis of total population, without regard to relative concentrations of voters or potential voters. The Fourth and Fifth Circuits have defaulted to treating such claims as unreviewable until the Court resolves the issue. *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) ("In the absence of a clear pronouncement from the Supreme Court on this issue, the district court's actions here should have been tempered by the overriding theme in the Court's prior apportionment cases weighing against judicial involvement."); *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000) (asserting that "propriety under the Equal Protection Clause of using total population rather than a measure of potential voters also presents a close question," and pending "more definitive guidance from the Supreme Court, we conclude that this eminently political question has been left to the

political process"). The district court applied *Chen*'s approach and allowed citizens in some Texas districts to continue exercising far greater voting power than their fellow citizens in other parts of the State. The Ninth Circuit says this form of vote dilution, *no matter how severe*, cannot give rise to an Equal Protection claim since district lines *must* be drawn on the basis of total population under the Fourteenth Amendment. *Garza v. County of Los Angeles*, 918 F. 2d 763 (9th Cir. 1990).

Here, as in *Garza* and *Chen*, the principal reason for the gross disparity in voting power between voters in Texas's senate districts is the presence of large numbers of people ineligible to vote who are counted for purposes of districts based on total population, but would not be counted in districts based on registered or potentially registered voters. *See Garza*, 918 F.2d at 773; *Chen*, 206 F.3d at 522. For at least two decades following *Reynolds*, the Court did not need to address this aspect of the reapportionment "thicket" because it could rightly assume that total population was an "effective proxy for voter population." Krabill & Fielding, *No More Weighting: One Person, One Vote Means One Person, One Vote*, 16 Tex. Rev. L. & Pol. 275, 282 (Spring 2012) (noting that, through the mid-1980s, "there were scant cases involving a one person, one vote challenge to a particular apportionment base.").

For many years following *Reynolds*, it remained a "happy coincidence" for redistricting purposes that eligible voters would "frequently track the total population evenly." *See Chen*, 206

F.3d at 525. That is no longer the case for several states. *Reynolds* recognized that the "complexions of societies and civilizations change, often with amazing rapidity," 377 U.S. at 567 And so it has in many states as a result of the increased presence of non-citizen residents ineligible to vote, particularly throughout the South and West. *See* Bryan Baker & Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012* at 3 (U.S. Dep't of Homeland Sec., Office of Immigration Statistics, March 2013) (charting increased growth of unauthorized immigrant population in late 1990s and early 2000s); Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2012* at 3 (U.S. Dep't of Homeland Sec., Office of Immigration Statistics, July 2013) (charting growth of legal permanent resident population during same period).[2]

This case demonstrates the relative ease with which relying solely on population equality across districts can cause gross disparities in voting

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[2] Government population statistics reveal that total population figures include more than 13 million authorized immigrants (legal permanent residents) throughout the nation, with heavy concentrations in California, New York, Texas, and Florida. Rytina, *supra* at 4. The government further estimates the presence of 11.4 million unauthorized immigrants. Baker & Rytina, *supra* at 1. Research shows that unauthorized immigrants comprise at least 6% of the total population in five States (Nevada, California, Texas, New Jersey, and Arizona) and six more states have concentrations of 4.1% or more. Jeffrey S. Passel & D'Vera Cohn, Pew Hispanic Center, *Unauthorized Immigrant Population: National and State Trends, 2010*, 15 (Feb. 1, 2011) (six more States have concentrations of 4.1% or more).

strength across districts in states with substantial populations people ineligible to vote. Despite plain statements by this Court in multiple cases that *equality of voting strength* lies at the heart of the one-person, one-vote doctrine, "[w]hatever the means of accomplishment,"[3] the Texas Legislature took no steps to adjust senate districts to reduce the voting-power disparity. *See* Juris. St. App. 24a, 33a, and SA-2-3.[4] As a result, Texas voters have vastly different voting strength depending on whether they live in areas with heavy concentrations of non-citizen residents. This violates *Reynolds*' "basic principle" that "the weight of a citizen's vote cannot be made to depend on where he lives." *See Reynolds*, 377 U.S. at 567 ("The fact that an individual lives here or there is

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[3] *See Reynolds*, 377 U.S. at 579 ("Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts *so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State.") (emphasis added); *Gaffney v. Cummings*, 412 U.S. 735, 744 (1973) (same); *Mahan v. Howell*, 410 U.S. 315, 322 (1973) (same); *Hadley v. Jr. College Dist. Of Metro. Kansas City, Missouri*, 397 U.S. 50, 54 (1970) (the "Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as is practicable, as any other person's.").

[4] This point bears emphasis. Whereas the issue is often cast as an either/or choice between population equality and equality of voting strength, *see, e.g.*, *Garza*, 918 F.2d at 775 (assuming that the alternative to strict population-based districts for city council was "refus[ing] to count" non-citizen residents and minors), the facts here demonstrate that both interests can be accommodated with relative ease. *See also infra*, sections II and III.

not a legitimate reason for overweighting or diluting the efficacy of his vote.").

This anomalous circumstance cries out for attention. The presence of substantial populations of non-citizen residents is a relatively recent development that has emerged over the past two decades and is not expected to change. In the meantime, *amicus* respectfully submits that voters impacted by this condition deserve the dignity guaranteed them under *Reynolds* and the Fourteenth Amendment. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." 377 U.S. at 567. Now is the time to address this debasement of citizens' voting power.

The concentrations of non-citizen residents ineligible to vote are generally most pronounced in circuits (the Fifth and Ninth) that have already addressed the issue. That these Circuits have taken starkly differing approaches only emphasizes the substantial and timely nature of the question.

II. "Equal Representation" Interests Should Not Trump Electoral Equality In Disputes Over Non-Congressional Districts.

District-drawers, courts, and commentators often assume that they face an either/or choice in redistricting: Do they pick population equality or voter equality? *Garza* provides the model for the debate. In a case that similarly involved the substantial presence of non-citizen residents, the Ninth Circuit accepted as a given that "[b]asing districts on voters rather than total population results in serious population inequalities across

districts." 918 F.2d at 774. It further assumed, "basing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district. Such a plan would dilute the access of voting age citizens in that district to their representative, and it would similarly abridge the right of aliens and minors to petition that representative." *Id.* at 775. Never mind that, as a result of this focus on population balancing alone, "a vote cast in District 1 count[ed] for almost twice as much as a vote cast in District 3." *Id.* at 780 (Kozinski, J., concurring in part and dissenting in part).

Judge Kozinski succinctly characterized the purportedly competing interests as the "principle of equal representation" versus the "principle of electoral equality." *Id.* at 781-785; *see also Chen*, 206 F.3d at 525 (discussing Judge Kozinksi's *Garza* opinion and noting that the "choice between these two models is stark"). *Amicus* agrees with Judge Kozinski's conclusion that "a careful reading of the Court's opinions suggests that equalizing total population is viewed not as an end in itself, but as a means of achieving electoral equality." 918 F.2d at 783 (Kozinski, concurring in part and dissenting in part); *see also id.* at 782 ("It is very difficult . . . to read the Supreme Court's pronouncements in this area without concluding that what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation."); *see also generally* Krabil & Fielding, *No More Weighting*, *supra* (discussing the competing models and arguing, at 277, that each of *Garza*, *Daly*, and *Chen* "improp-

erly cast the one person, one vote rule as protecting the right of nonvoters to equal representation instead of the right of voters to an equally weighted vote"). Again, and as Judge Kozinski stressed as well, *Reynolds* said the "overriding objective must be substantial equality of population among the districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen." *Garza*, 918 F.2d at 783 (Kozinski, concurring in part and dissenting in part) (citing *Reynolds*, 377 U.S. at 579 (emphasis in *Garza*).

The *Garza* majority disagreed. It read *Reynolds* as requiring strict adherence to population-balance *even if* it resulted in vote dilution. It concluded that *Reynolds* "held that apportionment for state legislators must be made upon the basis of population." 918 F.2d at 774 (citing *Reynolds*, 377 U.S. at 568). The sentence from *Reynolds* cited here, however ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.") is followed by a second sentence that proves Judge Kozinski's "so that" point:

> Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Reynolds, 377 U.S. at 568.

Garza also understood *Reynolds* to have applied the "standard enunciated" in *Wesberry v. Sanders*, 376 U.S. 1 (1964), "that 'the fundamental principle of representative government is one

of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state.'" *Garza*, 918 F.2d at 774. The surrounding language in *Reynolds*, however, undermines *Garza*'s holding and illuminates the larger issue here.

Before citing *Wesberry* as establishing the "fundamental principle of representative government" being equal representation, *Reynolds* stressed that *Wesberry* was "of course not dispositive of or directly controlling on our decision" involving state districts, because *Wesberry* involved *congressional districts*. Thus, *Wesberry* and *Gray v. Sanders*, 372 U.S. 368 (1963), "were based on different constitutional considerations and were addressed to rather distinct problems." *Reynolds*, 377 U.S. at 560. Namely:

> *Wesberry* was of course grounded on that language of the Constitution which prescribes that members of the Federal House of Representatives are to be chosen "by the People," [Article I, sec. 2] while attacks on state legislative apportionment schemes, such as that involved in the instant cases, are principally based on the Equal Protection Clause of the Fourteenth Amendment.

Reynolds, 377 U.S. at 560.[5]

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[5] *Garza* repeats this fundamental mistake by citing *Kirkpatrick v. Priesler*, 394 U.S. 526, 531 (1969), another congressional redistricting case, for the proposition that "[t]he purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'" 918 F.2d at 775.

Then, after citing *Wesberry*'s "fundamental principle," the Court summarized the *different* question at issue in *Reynolds*: "Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify *departures from the basic standard of equality among voters* in the apportionment of seats in state legislatures." *Id.* at 561 (emphasis added).[6] The Court then recognized the "individual and personal" nature of the one-person, one-vote right and rejected the various justifications proffered to avoid equality of voting.

Amicus respectfully submits that *Reynolds* provides the answer to the supposed choice between the interests of representative equality and electoral equality: a single-minded focus on population-balancing, at the expense of voting equality, violates the Equal Protection Clause. It is anomalous, to put it mildly. to conclude that the watershed opinion establishing an Equal Protec-

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[6] This passage also bears on the debate over the effect of *Burns v. Richardson*, 384 U.S. 73 (1966), which involved reliance on voting statistics where reliance on strict population figures would have led to extreme voting disparities in light of Hawaii's unusual demographics. Courts have reached very different conclusions about *Burns*. *Cf. Garza*, 918 F.2d at 774 (treating *Burns* as if it were in tension with *Reynolds*); *id.* at 784 (Kozinski, concurring in part and dissenting in part) ("*Burns* can only be explained as an application of the principal of electoral equality"); *Chen*, 206 F.3d at 526-27 (concluding that both sides in *Garza* were wrong when it came to *Burns*). In *Hadley*, it should be noted, the Court cited *Burns* for the proposition that "[t]his Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's." 397 U.S. at 54 and n.7.

tion right against vote dilution actually *requires* an apportionment method that *results in vote dilution.*

While the *Chen* court rejected *Garza*'s choice of priorities, it elected to choose neither side and instead followed *Daly*'s approach of treating the whole matter as a political question, pending "more definitive guidance from the Supreme Court." *Chen*, 206 F.3d at 528; *Daly* 93 F.3d at 1227 By refusing to intervene in the defense of voting equality, the Fourth and Fifth Circuits allow states, as Texas did here, to choose population equality as the ultimate goal, thereby permitting the very result that *Reynolds* held the Equal Protection Clause forbids: substantial vote dilution. Setting aside that the traditional understanding of the political question doctrine does not turn on perceived ambiguity in the Court's prior cases but rather on a variety of other factors,[7] the fact of the deep divide over which of the supposedly competing interests *Reynolds* serves only underscores the need for the Court's clarification.

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[7] The political question doctrine represents a "narrow exception" to the general rule that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (citations omitted). Under this doctrine, a court lacks authority to resolve a dispute "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* (citations omitted).

III. Technology May Have Rendered The Supposed Choice Between Population Equality And Voting Equality A False One.

Fifty years ago "it may not [have been] possible to draw congressional districts with mathematical precision," *Wesberry*, 376 U.S. at 18, but it is now. Advances in population database software (and its widespread use in the redistricting process) further underscore the propriety of granting plenary review. These advances show that most (if not all) cases no longer require an either/or choice between population equality and electoral equality. The complaint in this case alleged that "Texas could have safeguarded both the constitutional one-person, one-vote electoral principle and its interest in equally populated Senate districts." App 24a.

Within twenty years of *Wesberry*'s observation about the limits on fine-tuning district lines, the Court observed that computer-driven redistricting had altered the field:

> If anything, this standard [of population equality for congressional districts] should cause less difficulty now for state legislatures than it did when we adopted it in *Wesberry*. The rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal popula-

> tion and at the same time to further whatever secondary goals the State has.

Karcher v. Daggett, 462 U.S. 725, 733 (1983); *see also id.* at 752 (Stevens, J., concurring) ("developments in computer technology have made the task of the gerrymanderer even easier."). As Justice Powell put it a few years later, "[c]omputer technology now enables gerrymanderers to achieve their purpose while adhering perfectly to the requirement that districts be of equal population." *Davis v. Bandemer*, 478 U.S. 109, 174 (1986) (Powell, J., concurring in part and dissenting in part).

The technology has become even more sophisticated in the period since *Karcher* and *Davis*. Most recently, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), several Justices acknowledged that technological advances now enable a level of precision in district-drawing unimagined when *Baker*, *Reynolds*, and *Wesberry* were decided—and allow the task to be accomplished with relative ease and efficiency. *See id.* at 312-13 (Kennedy, J., concurring) ("Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months."); *id.* at 353-54 (Souter, J., dissenting) (citing, inter alia, Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 Stan. L.Rev. 731, 736 (1998) ("Finer-grained census data, better predictive methods, and more powerful computers allow for increasingly sophisticated equipopulous gerrymanders")); *id.* at 364 (Breyer, J., dissenting) (noting that "enhanced computer technology allows the parties

to redraw boundaries in ways that target individual neighborhoods and homes, carving out safe but slim victory margins in the maximum number of districts").

By 2000, all states used redistricting software that allowed "redistricting authorities to draw districts at the block level using point-and-click technology and evaluate basic measures of redistricting plans like population balance, party registration balance, and a few measures of compactness." Micah Altman & Michael McDonald, *The Promise & Perils of Computers in Redistricting*, Duke J. Const. L. & Pub. Pol'y 79 (2010); *see also id.* at 72-79 (surveying advances in redistricting technology). One commentator (quoted by Justice Souter in *Vieth*) has explained that "technological advance in data collection and computer technology" "have enhanced the capacity to gerrymander effectively. Recent cases now document in microscopic detail the astonishing precision with which redistricters can carve up individual precincts and distribute them between districts with confidence concerning the racial and partisan consequences." Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L.J. 2505, 2553-2554 (1997). *See also* Micah Altman, et al., *Pushbutton Gerrymanders? How Computing Has Changed Redistricting* in *Party Lines: Competition, Partisanship, and Congressional Redistricting* 51-67 (Thomas E. Mann & Bruce E. Cain eds. 2005) (surveying history of computer use in redistricting).

Given these advancements and the sophisticated resources at states' disposal, there appears to no longer be a technological barrier to crafting

districts that achieve *both* population equality *and* voting equality. At a minimum, plenary review is warranted to allow for further briefing on this issue.

CONCLUSION

For these reasons, and those stated by appellants, the Court should note probable jurisdiction and set the case for oral argument.

Respectfully submitted,

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